UPPER TRIBUNAL (LANDS CHAMBER)

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Case No: LRX/60/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – RIGHT TO MANAGE – costs incurred in consequence of a claim notice -- indemnity principle – whether applicable – if applicable whether evidence sufficient to show principle complied with – section 88, (4) Commonhold and Leasehold Reform Act 2002 – appeal allowed

TRIPLEROSE LIMITED

Appellant

Re: Forth Banks Tower,
Forth Banks,
Newcastle-Upon-Tyne
NE1 3PN

Determination on written representations

Martin Rodger QC
Deputy President

The following case is referred to in this decision:

Bailey v IBC Vehicles Limited [1998] 3 All ER 570

Introduction

1. This appeal is about the application of the principle of law known as the indemnity principle to the entitlement of a landlord to be paid costs incurred in consequence of a claim to exercise the right to manage under Part 2 of the Commonhold and Leasehold Reform Act 2002. The principle is that a paying party is not required to pay a receiving party more by way of costs than the receiving party is itself liable to pay to its own solicitor. The rationale for the principle is that the receiving party should not be permitted to make a profit out of the resolution of the dispute at the expense of the paying party.

2. In Chapter 5 of the Final Report of his Review of Civil Litigation Costs (December 2009) Sir Rupert Jackson described the indemnity principle as having "assumed a totemic character" and said that "Opponents see the indemnity principle not only as a relic of the nineteenth century, but also as the root cause of satellite litigation and wastage of costs; they maintain that it should be abolished." He sympathised with that view and recommended the abrogation of the principle (paragraph 3.3), although nothing has yet come of that recommendation.

3. On 16 April 2015 the First-tier Tribunal (Property Chamber) ("the F-tT") determined a claim by the appellant, Triplerose Limited, for the payment of costs which it had incurred in consequence of a claim notice given by Forth Banks RTM Company Limited under the right to manage provisions of the 2002 Act. The substantive claim had been withdrawn on the day before a hearing to determine the entitlement of the RTM Company to acquire the right to manage Forth Banks Tower, the building in Newcastle from which it derives its name.

4. In its costs decision the F-tT allowed the fees of counsel and the appellant's managing agents totalling £4,866 but disallowed a further £4,276 claimed as fees of the appellant's solicitors. Despite being satisfied that reasonable cost incurred as a consequence of the claim notice would include £3,632.65 in solicitors' fees, the F-tT disallowed the appellant's solicitors' fees because it was not satisfied on the evidence that the indemnity principle had been complied with in relation to those fees.

5. The appellant sought permission to appeal which was refused by the F-tT but granted by the Tribunal. The RTM Company has chosen not to respond to the appeal, which I have determined after considering the appellant's written representations.

The statutory framework

6. Where an RTM Company claims the right to manage under Part 2 of the 2002 Act both the company and its members come under a statutory liability to pay certain costs. Section 88 of the 2002 Act makes the following provisions:

> "88 **Costs: general**
>
> (1) A RTM company is liable for reasonable costs incurred by a person who is—

(a) landlord under a lease of the whole or any part of any premises,
(b) party to such a lease otherwise than as landlord or tenant, or
(c) a manager appointed under Part 2 of the [Landlord and Tenant Act 1987] to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before the appropriate tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by the appropriate tribunal."

7. By section 89(1)-(2) it is provided that, where a claim notice is withdrawn or ceases to have effect, the liability of the RTM company is a liability for costs incurred down to that time. In England the appropriate tribunal, referred to in section 88(3)-(4), is now the F-tT.

Background

8. The appellant is the landlord of Forth Banks Tower. On 3 February 2011 the RTM Company served a claim notice on the appellant under section 79 of the 2002 Act claiming to be entitled to acquire the right to manage Forth Banks Tower. The appellant disputed the claim and served a counter notice prompting the RTM Company to apply to the Leasehold Valuation Tribunal (the predecessor of the F-tT) to determine its entitlement. On the afternoon before the hearing the RTM Company's solicitors gave notice under section 86 of the 2002 Act withdrawing the claim notice. As a result of that withdrawal the LVT dismissed the RTM Company's application at the hearing on 15 September 2011.

9. On 15 December 2012 the appellant's solicitors, Conway & Co, delivered two invoices to the appellant covering its fees arising out of the notice of claim. The firm of Conway & Co (but not the individual solicitor with conduct of this matter) subsequently ceased acting for the appellant and it was not until 18 June 2014 that a new firm, Scott Cohen, Solicitors, made an application to the F-tT under section 88(4) of the 2002 Act seeking an order for the payment of the following costs:

(1) Solicitor's fees incurred as a consequence of the claim notice	£1,239.26
(2) Solicitor's fees incurred in connection with the proceedings before the LVT	£3,036.74

(3)	Managing agents fees	£ 666.00
(4)	Counsel's fees	£4,200.00

10. In response to directions given by the F-tT on 21 July 2014 both parties provided statements of case, but neither requested an oral hearing so the application was determined on the basis of the written material alone. On 13 March 2015 the appellant's solicitors provide more information in response to a request from the F-tT.

The F-tT's decision

11. In paragraphs 11 to 13 of its decision the F-tT dealt with a preliminary objection of behalf of the RTM Company which complained that there had been an inexcusable delay in making the application for costs. The F-tT recorded that the appellant's explanation for the delay was that it had decided to wait until the costs of a separate right to manage claim concerning another of its buildings, Hanover Mill, had been determined by the F-tT before seeking to recover its costs of the Forth Banks Tower claim. The F-tT did not comment on that explanation but pointed out correctly that it had no power to reduce or disallow costs incurred in connection with an RTM claim simply on the grounds of delay.

12. In paragraph 15 of its decision the F-tT recorded that the RTM Company had put the appellant to proof that the indemnity principle had been complied with and stated that "that is fundamental to any assessment of costs and particularly so when the assessment is on the indemnity basis." For that reason the appellant's solicitors were asked by the F-tT to certify that the indemnity principle had been satisfied and that the appellant had paid all of the sums claimed. In response to that request the appellant produced receipted invoices for its managing agents and counsel but the invoices in respect of Conway & Co's fees were not receipted and had not yet been paid.

13. As this appeal turns in part on the F-tT's assessment of the evidence and the sufficiency of its reasons, it is necessary for me to set out the relevant passages in its decision in full:

> "19. In civil proceedings, the signature of a statement of costs or a bill for detailed assessment by a solicitor is in normal circumstances sufficient to enable the court to be satisfied that the indemnity principle has not been breached in respect of costs payable under a conventional bill: *Bailey v IBC Vehicles Limited* [1998] 3 All ER 570. In proceedings before the tribunal under the 2002 Act there is no requirement for a formal bill of costs to be provided in a prescribed form. In these circumstances, it is incumbent on the Tribunal, particularly when the paying party has put the Applicant to proof, to establish compliance with the indemnity principle.
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> 20. In civil proceedings, if two firms of solicitors have dealt with a matter, the bill of costs is split and both firms sign the bill of costs to confirm that the indemnity principle has not been breached (CPR PD 47.5.8). That rule does not apply in the present case but the point that lies behind it should have been addressed by the Applicant. The Tribunal has nothing from Conway & Co other than its unreceipted invoices.

21. The Applicant's solicitors submit that in relation to the solicitor's fees the indemnity principle does not require payment. They point to the fact that Conway & Co's invoices are addressed to the Applicant and they rely on the extract provided from the solicitor's terms of appointment. Reference is made to the decision in the Hanover Mill case which allowed Conway & Co's fees.

22. The right to manage proceedings were concluded on 11 September 2011 but Conway & Co's invoices were not raised until 15 November 2012 and have not been paid.

23. Conway & Co's letter of engagement dated 16 April 2010 provides that it is the usual practice to ask clients to make payments on account of anticipated costs and that the file will be reviewed on a monthly basis and normally a bill would be raised at that time. If a substantial amount of work is carried out a bill may be raised before the monthly review. Such terms are common between solicitors and their clients. The letter goes on to state that in the event that the Applicant instructs another solicitor Conway & Co may decline to release any papers until payment of bills has been made in full.

24. In this case, no payment on account was made, no monthly bills were raised and the invoices were not paid when the applicant changed its solicitors. The Applicant's current solicitors state that Conway & Co agreed to delay the payment terms to allow for costs to be paid at the conclusion of proceedings. They say, normally, that they would have extended payment by three or four months but in this case there has been unusual delay. In fact the delay is very substantial. The work was done more than 4 years ago and the invoices had been outstanding since November 2012. The applicant is no longer a client of Conway & Co and it is very unusual for a firm of solicitors to defer payment even after it has been replaced by new solicitors.

25 – 26. [Counsel's and managing agents' fees allowed.]

27. The Tribunal can only make its decision on the basis of the evidence before it. The Tribunals is not satisfied on the evidence that the indemnity principle has been complied with in respect of Conway & Co's fees. The circumstances are unusual and the Applicant has left a good deal unexplained. The Tribunal does not allow the claim in respect of the legal fees."

14. Despite having disallowed Conway & Co's fees in full the F-tT consider that it might assist the parties if it set out its findings in respect of the amounts claimed. It then proceeded to consider the two invoices from Conway & Co, finding £1,206.05 to be a reasonable charge in respect of costs incurred as a consequence of the claim notice other than in connection with the LVT proceedings and a further £2,426.60 to be reasonable as solicitor's fees in connection with the LVT proceedings themselves.

The indemnity principle

15. The principle which the F-tT applied in denying the appellant the recovery of the reasonable costs of its solicitors in responding to the claim notice is the common law principle that a paying party cannot be ordered to pay a receiving party more by way of costs than the receiving party is

itself liable to pay. That principle is reflected in section 60(3), Solicitors Act 1974, which provides:

> "A client shall not be entitled to recover from any other person under an order for the payment of any costs to which a contentious business agreement relates more than the amount payable by him to his solicitor in respect of those costs under the agreement."

16. In *Bailey v IBC Vehicles Limited* [1998] 3 All ER 570, to which the F-tT referred, the Court of Appeal emphasised that when assessing a bill of costs the court was entitled to be satisfied that the indemnity principle was not being infringed, so it could, if necessary, call for the production of material which would otherwise be the subject of legal professional privilege. Having acknowledged the extent of the court's powers Judge LJ nevertheless went on to say that:

> "… an emphatic warning must be added against the over enthusiastic deployment of these powers, particularly at the behest of the party against whom the order for costs has been made. As Judge Cooke recognised, the danger of "satellite litigation" is acute. As far as possible consistent with the need to arrive at a decision which does broad justice between the parties, it must be prevented or avoided, and the additional effort required of the parties kept to the absolute minimum necessary for the taxing officer properly to perform this function."

17. *Bailey* concerned costs payable in routine county court litigation, in which the applicable rules require the service of a bill of costs accompanied by a certificate signed by the receiving party's solicitor that the costs stated in the bill do not exceed the amount of the costs which the receiving party is obliged to pay to the solicitor. It is part of the professional responsibilities of the solicitor to ensure that the bill of costs does not offend the indemnity principle and the solicitor's signature on the bill gives rise to a presumption to that effect. As the Court of Appeal made clear, the court should proceed on the basis that the certificate is correct unless there is reason to think otherwise.

18. Judge LJ's emphatic warning in *Bailey* is just as apt to dispute resolution in tribunals which have no general costs shifting powers. In the F-tT, an over-zealous application of the indemnity principle should be avoided as it may cause disproportionate costs to be incurred in unnecessary satellite disputes over the recovery of modest sums, contrary to the overriding objective of dealing with cases fairly and justly (which includes dealing with them in ways which are proportionate to the importance of the case and the resources of the parties).

19. Section 88(2) of the 2002 Act provides substantial protection to RTM companies and their members by limiting the costs payable by them in respect of professional services to such as "might reasonably be expected to have been incurred by [the landlord] if the circumstances had been such that he was personally liable for all such costs." Section 88(2) appears to assume that, presumably because of the liability imposed on RTM companies by section 88(1), the circumstances will be such that landlords will not, generally, be "personally liable for all such costs". It seems to me to be highly questionable, in the light of section 88(2), whether the

indemnity principle has any role to play in the determination of costs under section 88. Landlords and other recipients of a claim notice mentioned in section 88(1) have a statutory entitlement to reasonable costs incurred in consequence of a claim notice, subject to the limitation in section 88(2) and the protection afforded by section 88(3)-(4). I appreciate that section 88(1) renders the RTM company liable only for "costs incurred", which may leave a chink open for the application of the principle, but it is not necessary to reach a final conclusion in this unopposed appeal on the compatibility of the indemnity principle with the statutory scheme. It is sufficient to point out that the express statutory protection afforded to the paying party by section 88(2) is a further reason why tribunals should discourage, rather than incite, challenges based on the indemnity principle.

The appeal

20. The appellant was granted permission to appeal on the grounds that the evidence provided by the appellant's two firms of solicitors of its liability to pay Conway & Co's fees should have satisfied the F-tT that the indemnity principle was not being breached, and that if the F-tT regarded such evidence as unreliable or insufficient then it should have explained why.

21. Assuming the F-tT was entitled to have regard to the indemnity principle at all, it was required to decide whether, on the balance of probability, the appellant was liable to pay the fees of its former solicitors. The evidence presented to it was all one way. No affirmative case was advanced by the RTM Company to suggest the existence of any arrangement inconsistent with the indemnity principle; the RTM Company merely put the appellant to proof. In response to that formulaic challenge the appellant produced a copy of the client care agreement between it and Conway & Co, dated 16 April 2010. As was explained in that agreement the fee earner responsible for the appellant's instructions was Miss Lorraine Scott. Monthly billing was to be the "usual practice" and there was nothing in the agreement to suggest that Conway & Co's fees would be deferred until completion of a particular instruction or that they would not be payable unless an equivalent sum was recovered from a third party pursuant to an order of a court or tribunal.

22. The application for costs under section 88 was in the F-tT's standard right to manage form and was accompanied by a letter dated 17 June 2014 and a further schedule in which Conway & Co listed the professional fees describing them as "incurred by the landlord". The standard form provides no opportunity for an applicant to explain the nature of the application but it is required to be supported by a statement of truth which was signed by Conway & Co. Given the limitations of the form the statement of truth ought reasonably to be understood as extending to the contents of the covering letter and the accompanying breakdown of costs which together constituted the application.

23. The F-tT had additionally the appellant's statement of case in which, once again, it was asserted with the support of a statement of truth signed by Conway & Co on the appellant's behalf, that the fees claimed had been incurred and that they were charged by Conway & Co for work undertaken by Miss Scott.

24. The F-tT also had a letter of 13 March 2015 from Scott Cohen, Solicitors, who had taken over the application from Conway & Co, which dealt with the circumstances in which the making of the application had been delayed. The footer on each page of the letter recorded that the new firm's sole practitioner was Miss Scott. She explained that the application had been delayed to await the outcome of a similar application in relation to Hanover Mill, the adjoining block of flats of which the appellant was also the landlord and in relation to which a similar right to manage claim had been made and withdrawn. One of the members of the RTM company at both buildings was a company which owned multiple flats and which the appellant regarded as the "lead applicant". The appellant's costs had been disputed in both cases and it had decided to wait until its entitlement had been determined and it had recovered payment for Hanover Mill because (the letter suggested) the costs of section 88(4) proceedings were not recoverable. Payment was eventually received for Hanover Mill on 22 May 2014, and the application in relation to Forth Banks Tower was then commenced. Scott Cohen also explained that there had been further F-tT proceedings in relation to the cost of major works to both buildings which had not been concluded until 2014 and that the appellant had preferred to spread the cost of its various disputes over a period of time.

25. The letter of 3 March 2015 included a specific statement by Miss Scott that:

> "We can confirm that the costs subject to this application are costs which the applicant is liable to pay to its solicitor notwithstanding recovery from a third party."

26. It is clear from the F-tT's decision, and in particular from paragraph 27, that it regarded the circumstances of this case as unusual. I agree and I would hope that a delay of 2 years and 9 months between the dismissal of a claim to acquire the right to manage and an application by the landlord for the payment of its costs under section 88 would be wholly exceptional. Nevertheless, as the F-tT had correctly pointed out, the 2002 Act does not require that an application under section 88(4) be made within any particular time limit, nor do the F-tT's own rules of procedure impose any such limit. The only requirement is that the receiving party's claim for costs under section 88(1) should be brought within the period of 6 years allowed for claims under a statute by section 9, Limitation Act 1981.

27. The F-tT summarised but did not comment on the explanation provided by Scott Cohen for the delay in commencing the application. It noted that "the applicant's current solicitors state that Conway & Co agreed to delay the payment terms to allow for costs to be paid at the conclusion of the proceedings" but it did not say whether it accepted that such an agreement had been reached. It did not refer to the fact that the same solicitor, Miss Scott, had acted for the appellants throughout, or consider whether the explanation and information she provided was likely to have been underpinned by first hand knowledge.

28. I am satisfied that the F-tT's approach was wrong in principle. In paragraph 19 of its decision it treated the absence of a requirement for a formal bill of costs, accompanied by a certificate by the receiving party's solicitor confirming compliance with the indemnity principle, as requiring it to be especially vigilant. It considered that "in these circumstances" it was "incumbent on the Tribunal, particularly when the paying party has put the applicant to proof, to

establish compliance with the indemnity principle." I disagree. The absence of a formal procedure requiring bills of costs in a prescribed form does not disturb the presumption created by the verification of the appellant's liability by its own solicitor, while a formulaic "putting to proof" creates no higher hurdle and calls for no additional vigilance. Where an application for costs is made by a solicitor on behalf of a successful landlord, the F-tT can and should take considerable comfort from, and place reliance on, what it is told by that solicitor. The words of Judge LJ in *Bailey* apply just as much to solicitors acting in tribunals as they do to court proceedings:

> "As officers of the court, solicitors are trusted not to mislead or to allow the court to be misled. This elementary principle applies to the submission of a bill of costs."

The F-tT in this case lost sight of that elementary principle. As a result it caused the appellant to incur unnecessary costs in recouping a modest bill.

29. The F-tT also failed to explain why the evidence failed to satisfy it that the indemnity principle had been complied, referring opaquely to "a great deal unexplained" without identifying what information was missing or attempting to assess whether the material before it was sufficient or insufficient to provide the explanations it thought were necessary. Nor did it consider whether there was any credible alternative explanation for the information provided by Miss Scott on behalf of the appellant. If taken at face value that information established clearly that the appellant was liable to pay Conway & Co's fees. The only basis on which that liability could have been diminished or avoided altogether would be under some separate agreement which had not been disclosed. The F-tT had been told in explicit terms by Miss Scott that the appellant was liable to pay its solicitors notwithstanding recovery from a third party, that there was no "no win no fee arrangement in place", and that Conway & Co had agreed to allow its fees to be paid at the conclusion of proceedings. None of those statements was inherently improbable, yet none could be true if there was an undisclosed arrangement infringing the indemnity principle.

30. Before concluding that the evidence was not sufficient to satisfy it that the indemnity principle had been complied with, it was essential for the F-tT to consider the alternative hypotheses, to weigh them up in the light of all of the facts, and to come to a view on whether it was more likely than not that the appellant was liable for its own solicitor's fees as Miss Scott said it was. If the F-tT had explicitly posed the alternatives, and assessed the evidence in the light of them, it could not have failed to conclude that there was nothing to displace the very strong presumption that Miss Scott was entirely truthful and, moreover, that she was the person best placed to know that what arrangements had been made.

31. For these reasons I allow the appellant's appeal and set aside the decision of the F-tT.

32. The F-tT made a helpful assessment of the reasonable costs which would have been payable by the RTM Company up to the date of the original hearing in the event that it had been satisfied on the indemnity principle issue. There has been no appeal in relation to that assessment. The figures were £1,206.05 for costs falling within section 88(1) (with the

exception of the costs of the LVT proceedings) and a further £2,426.60 in respect of the costs of the LVT proceedings. In aggregate those costs total £3,632.65 and I therefore determine that, in addition to the sum of £666 in respect of management fees and £4,200 in respect of counsel's fees awarded by the F-tT, the further sum of £3,632.65 is payable by Forth Banks RTM Company Limited and by each person who was or had been a member of the RTM Company at the time the claim notice was given (3 February 2011) and up to the date on which the right to manage claim was dismissed (15 September 2011).

Martin Rodger QC

Deputy President

11 February 2016